SINGAPORE REPORTS.

TAI THEONG AND ANOTHER v. REX.

[App. Crim. Juris. (Brown, J.) November 16, 1946]

Liquors Revenue Ordinance (Cap 225), Section 28 (1) and 83 (1) — Possession of dutiable liquor — Forfeiture of motor-car — Construction of Statutes — The Ejusdem Generis Rule — Criminal Procedure Code, Section 182 (f).

The appellant and another accused were convicted of being in possession of dutiable liquor, an offence under Section 28 (1) of the Liquors Revenue Ordinance. The evidence was that at 5 p.m. on 1st July 1946 two Revenue Officers took up their position in a back lane between Angus Street and Fisher Street in order to wait for a certain car, No. S.4819, which it was anticipated would contain dutiable liquor. At about 5.30 p.m. Car No. S.4819 duly arrived. Before the Revenue Officers could reach the car a woman jumped out of the back seat, and escaped. The car then started off immediately and collided into a wall. In the car, when the Revenue Officers came up, were the driver (in the driving seat) and the appellant in the back seat. On the floor at the back of the car was a gunny sack. The appellant had his feet on the gunny sack, which on being opened was found to contain a motor-car tube containing samsu. A further search revealed two more tubes containing samsu behind the cushion in the back seat. The learned Magistrate convicted the appellant and the driver and also ordered the liquor and the motor-car to be confiscated. The appellant appealed against his conviction and sentence and against the order for forfeiture of the motor-car.

Held, (1) that the facts showed that the appellant was only an innocent passenger in the car and that therefore the Magistrate should have acted under Section 182 (f) of the Criminal Procedure Code and acquitted him without calling upon him to make his defence;

(2) that, as there is no common feature in the words preceding "or conveyances" in Section 83 (1) of the Liquors Revenue Ordinance and no common genus or category to which they all belong, the **ejusdem generis** rule has no application to the sub-section and that therefore the word "conveyances" must be given its full and natural meaning, which includes motor-cars;

(3) that under Section 83 (1) of the Liquors Revenue Ordinance the Magistrate had no discretion and was bound to order the forfeiture of the car which the Revenue Officer had seized.

Cases referred to:—

(1) *P. P. v. Lee Yee Heng* (1938) 7 M.L.J. 117.
(2) *Tan Ah Lek v. Rex* (1941) 10 M.L.J. 56.
(3) *Magnhild (S.S.) v. McIntyre Brothers & Co.* (1920) 3 K.B. 321.
(4) *Tillmans v. S. S. Knutsford* (1908) 2 K.B. 385.
(5) *Danby v. Hunter* 5 Q.B.D. 20.
(6) *Williams v. Ellis* 5 Q.B.D. 175.
(7) *White v. White* (1916) 1 Ch. 172.
(8) *Rex v. Ong Guan* (1933) 2 M.L.J. 17.
(9) *De Keyser v. British Railway Traffic and Electric Co. Ltd.* (1936) 1 K.B. 224.

MAGISTRATE'S APPEAL.

T. W. Ong for the appellant.

A. W. Bellamy for the respondent.

Cur. Adv. Vult.

Brown, J. : — This appellant, with one other accused person, was convicted by the learned Magistrate of being in possession of dutiable liquor, to wit 20 gallons of samsu, contrary to Section 28 (1) of the Liquors Revenue Ordinance and was sentenced to pay a fine of $1,102.50 (being 5 times the amount of the duty) or 12 months R.I. in default.

A preliminary ground of appeal was that no copy of the amended charge or of the original charge was served on the appellant, and that he was under the impression that the case was for mention only on the date when it came before the Magistrate and had so instructed his Counsel, Mr. Ong. No objection upon the ground that the charge or the amended charge was not served was made at the hearing, although at the commencement of the hearing the appellant was represented by Mr. B. H. Chia. Mr. Chia informed the Court that Mr. Ong was engaged before the High Court and asked for a *postponement* on his behalf. It is difficult to understand why no application for *adjournment* was made if Counsel had in fact been instructed that the case was for mention only. Mr. Ong, who arrived in Court during the examination-in-chief of the 2nd witness for the prosecution, made no mention of the fact that he understood that the case was for mention only and made no application for an adjournment then. Mr. Ong confined himself to expressing regret for being late, giving the reason, and proceeded to take part in the case. There is no substance in this ground of appeal.

The evidence was that at 5 p.m. on 1st July 1946 two Revenue Officers took up their position in a back lane between Angus St. and Fisher St. in order to wait for a certain car, which it was anticipated would contain dutiable liquor. The number of the car for which they were waiting was S.4819. At about 5.30 p.m. car No. S.4819 duly arrived, coming down Angus St. and turning into a back lane. Whether it was the same back lane as the one in which the Revenue Officers were waiting is not clear from the evidence, but the point is of no materiality in this appeal.

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Before they could reach the car a woman jumped out of the back seat, and escaped. The car then started off immediately and collided into a wall. In the car, when the Revenue Officers came up, were the driver (in the driving seat) and this appellant in the back seat. And on the floor at the back was a gunny sack. The appellant had his feet on the gunny sack, which on being opened was found to contain a motor-car tube containing samsu. A further search revealed two more tubes containing samsu behind the cushion in the back seat.

In a signed statement taken from this appellant, which was recorded by one of the Revenue Officers immediately after the arrest, he stated that at 5 p.m. on that day he saw the driver of S.4819 (which in his statement he called 'a taxi') coming down from the Naval Base towards the town, and asked him for a lift to town. The driver agreed, and he took a seat beside the woman. On the way he saw the gunny sack and felt it with his foot. He also got the smell of samsu. He asked the driver about this and was told to keep quiet and ask no questions. The driver of the car, who with the appellant was convicted of being in possession contrary to Section 28 (1), also made a signed statement immediately after his arrest, in which he corroborated the appellant's story about the lift. Neither the appellant nor the driver had been arrested before.

As in the case of other offences so in the case of an offence under Section 28 (1) of the Liquors Revenue Ordinance, mens rea is a necessary element. The prosecution has to prove not merely that the accused person was in actual physical possession, but that he was in such possession with some criminal knowledge or intent.

Now let us examine the evidence for the prosecution by which it is said that mens rea has been established.

(1) The Revenue Officers were waiting for this particular car. There is nothing against the appellant in that fact because there is no evidence to shew what (if any) interest he had in the car, or how he came to be sitting in the car, except his own statement that he was being given a lift.

(2) He was seated on the back seat beside the woman who escaped, and the front seat beside the driver was vacant. I can see nothing sinister in a person who is given a lift sitting in the back and not in the front.

(3) He had his feet on the gunny sack. Being in the back seat, the gunny sack was on the floor below his feet and, according to R.O. 189, was "more than half the size of the width of the floor of the back seat." It was therefore not unnatural that he should have had his feet on the gunny sack.

(4) Behind the cushion of the back seat, where he was sitting, two further tubes of samsu and a rattan basket were found. It was stated in evidence that in order to put the basket and tubes behind the cushion, the cushion would first have to be removed. It would not be possible to put anything behind the cushion from outside the car. A person sitting on the back seat would therefore not know that they were there, unless he had either put them there himself or had seen or heard of somebody else putting them there. There is no evidence of either.

(5) In his signed statement, made immediately after his arrest, he admitted that he smelt samsu and mentioned it to the driver, who told him to keep quiet and ask no questions. Not only can I see no evidence of any criminal intent in that admission, but it is the sort of admission which he might have been expected to make if his story about the lift was true.

(6) At the end of his signed statement the appellant said: "I know nothing about the liquor. Probably Eng Hin (the driver) can tell you better. I do not *think* I am guilty." I can see nothing in that to imply any sort of admission of the offence. He was presumably told (though there is no evidence of this) that he was being arrested for being in possession of samsu. He was in physical possession of it. He was in the car with it, and the sack containing it was under his feet. He can hardly be expected to understand the niceties of mens rea. And he may well have been uncertain whether, being in physical possession, he had not in some way committed the offence of being in possession contrary to the Ordinance.

Those six points constitute the sum total of the case for the prosecution against the appellant. It has been said that if the evidence here does not establish a prima facie case it would be difficult ever to get a prima facie case of being in possession under this sub-section. I cannot for one moment agree with that. We need look no further than to the case of the other two occupants of this car. If the woman had been caught, there would have been the fact that immediately upon seeing the Revenue Officers, she jumped out of the car and ran away. In the case of the driver there was the fact that immediately on seeing the Revenue Officers he tried to drive away and in his haste collided into the wall. And there is the further fact that according to the signed statement of his co-accused, when the driver was asked about the smell of samsu he told his co-accused to keep quiet and ask no questions.

By Section 182 (f) of the Criminal Procedure Code the Court is required to record an order of acquittal if, at the close of the prosecution case, no case has been made out which, if unrebutted, would warrant the accused's conviction. In my view the prosecution, at the end of their case, had failed to prove the necessary element of mens rea. At the most, it was a case of suspicion; and upon the authority of *P. P. v. Lee Yee Heng*[1] I consider that the learned Magistrate should not have called upon the appellant to make his defence.

On being called upon to make his defence, the appellant gave evidence about the lift which was substantially to the same effect as in his signed statement. He repeated that in the car he smelt samsu and asked the driver about it. But he denied that the driver had told him to keep quiet and ask no questions, and said that he had only said this in his signed statement because he had seen the driver being hit by the Revenue Officer and he was frightened. Clearly in the course of a case for the defence it may sometimes happen that some fact or admission comes out which may so strengthen a weak prosecution case as to warrant a conviction. But there is certainly nothing in this defence case to supply the essential element of mens rea—and to prove it beyond any reasonable doubt—which the prosecution case had failed to supply. The appellant's conviction and sentence must be set aside.

The Magistrate also ordered the car to be forfeited under the provisions of Section 83 (1). The owner of the car, whose driver was the man convicted with the appellant, appealed against this Order. But his appeal was dismissed upon the ground that he was not a party to the "criminal case or matter", as required under Section 302 (1) of the Criminal Procedure Code. Although the appellant is not the owner of the car, and there is no evidence to shew that he has any interest in it he has appealed against the order of forfeiture, and it is agreed that there is no reason why he should not.

This part of the appeal raises a point of some importance. Section 83 (1) says :—

> All intoxicating liquors....in respect of which any offence....has been or is being committed, together with....any receptacle, package, cart, carriage or conveyance in which the same are found, or which has been used in connection with such offence, may be seized by any revenue officer, and all such intoxicating liquors....receptacles, packages, carts, carriages or conveyances shall be forfeited.

The important points in the sub-section are (1) any conveyance used in connection with the offence *may* be seized by any revenue officer, and (2) all such conveyance (i.e. those that are seized) *shall* be forfeited.

If this sub-section means what it would appear to mean, then the most innocent owner, who for example has his car stolen by a thief who uses it to convey dutiable liquors, is liable in law to have his car seized at the discretion of a revenue officer; and if it is so seized the Court which tries the case, and has all the facts on both sides before it, is allowed no discretion at all and is bound to confirm the revenue officer's action by making an order for forfeiture. Now between the wholly innocent owner and the thoroughly culpable owner there are many degrees of guilt. There may be the owner who is guilty of culpable carelessness. There may be the owner who in fact procured the commission of the offence and was the principal person responsible. And one might have expected the Legislature to have entrusted the difficult duty of deciding whether the owner's degree of guilt is such as to merit the forfeiture of his car to the Court, where the assessing of degrees of guilt and the awarding of punishment appropriate to each degree is a matter of every day experience. That in practice no car is ever seized except after careful consideration by a senior Customs officer may be true. The point is that if the sub-section means what it appears to mean (as Mr. Bellamy contends) the discretion is vested in an executive official whose department is an interested party in the matter, and

no discretion whatever is allowed to the court which hears both sides of the case.

Mr. Ong has argued :—

(1) that a motor-car is not covered by the words "receptacles, packages, carts, carriages or conveyances";

(2) that the Legislature cannot have intended to produce such an effect as I have described;

(3) that in a case of doubt, the doubt must be resolved in favour of the innocent owner; and that for the sub-section to be made to bear the construction for which Mr. Bellamy contends the wording must be clear and unambiguous.

Mr. Ong relies on a decision of Pedlow J. in the case of *Tan Ah Lek v. Rex*[2], which I am informed is the most recent decision on the point. The 'ratio decidendi' in that case was not that a motor-car is not covered by the words "carts, carriages and conveyances." But the learned Judge expressed his view that it was "very doubtful if this Ordinance can be construed reasonably to include anything beyond things ejusdem generis as the things mentioned therein, i.e. carts, carriages and conveyances of the nature of carts and carriages. I do not, however, think that it is necessary for me to decide this point in this present case."

Mr. Ong has argued that "conveyances" is the general word which follows "carts" or "carriages", and that the meaning of "conveyances" is therefore limited to the kind of conveyances which are "carts" or "carriages", and does not include motor-cars. He has referred to a number of statutory enactments, such as the Municipal Ordinance, the Singapore Traction Ordinance, The Traction Engines and Motor Cars Ordinance, in which various types of vehicles, such as a "motor-car", a "trolley-bus", a "traction engine", a "hackney carriage" are all specifically defined. I do not think that helps us because all those Ordinances are dealing with those different types of vehicles, to each of which different statutory provisions are made to apply; and it is therefore necessary that each type of vehicle should be specifically defined.

In *Magnhild (S.S.) v. McIntyre Brothers & Co.*[3] McCardie J. considered the ejusdem generis rule in the light of the relevant authorities. The rule is that general words may be restricted to the same genus or category as the specific words that precede them. But where you have more than one specific word preceding it is essential, before the rule can be applied, that they should all be in a common category. As was said by Farwell L.J. in *Tillmans v. S. S. Knutsford*[4]: "Unless you can find a category there is no room for the application of the ejusdem generis doctrine." What is the common genus or category to which the words used in this sub-section belong? It must be observed that the words are not merely "carts, carriages or conveyances." The words used are "all such intoxicating liquors, toddy, stills, utensils, apparatus, receptacles, packages, carts, carriages or conveyances." McCardie J. after considering the authorities, said: "But the rule of ejusdem generis cannot be applied at all unless there be some broad test for the ascertainment of the genus. So far as I can see the only test seems to be whether the specified things which precede the general words can be placed under some common category. By this I understand that the specified things must possess some common and dominant feature." What is the common and dominant feature in the string of specific words contained in Section 83 (1)? What feature, for example, has "toddy" in common with "receptacles" or "packages"? What has a "still" in common with a "cart"?

Mr. Ong referred to three English cases in support of his contention. In *Danby v. Hunter*[5] an information was laid against the respondent for using a cart without having his name painted on it, contrary to section 76 of the Highway Act which required the owner's name to be painted on any "waggon, cart or other such carriage." The cart in question was not a heavy vehicle like a waggon but a light spring cart with two wheels, which the respondent used for taking his family about. It was held that the words "cart or carriage" must refer to vehicles which were ejusdem generis with "waggon". In *William v. Ellis*[6] a local Turnpike Act imposed a toll on particular carriages which were described "or other such carriages", and it then imposed a further toll upon "every carriage of whatever description and for whatever purposes, impelled by steam or any other power not being that of horses." It was held that the carriages here referred to must be ejusdem generis with the carriages previously specified, and did not include a bicycle. In both those cases, which deal with the ejusdem generis rule, you have the genus—"waggon" in the first case, and "carriages" in the second. But in the sub-section which I am now considering, we find a number of nouns of an altogether different

genus, such as "intoxicating liquors", "utensils", "receptacles" and "carriages."

The third case to which Mr. Ong referred was *White v. White*[7]. That case does not deal with the ejusdem generis rule. It arose out of the construction of a will. And it was held that a motor-car did not come within the meaning of the word "carriages." The case is not in point because here the question is not whether a motor-car is covered by the word "carriages", but whether it is covered by the words "carriages *or conveyances.*"

For the reason that in the nine specific things which precde the words "or conveyances" I can find no common feature and no common genus or category to which they all belong, I hold that the ejusdem generis rule has no application to this sub-section and that the word "conveyances" must therefore be given its full and natural meaning, which includes motor-cars.

But the reason for the decision of Pedlow J. in the *Tan Ah Lek* case, as I understand it, is the same as Mr. Ong's second line of argument, namely that the Legislature could not have intended that the property of an innocent third party *must* be forfeited. He says :—

> There is no doubt that an offence was committed in respect of this liquor and that the liquor was found in the taxi. Does section 83 of the Ordinance mean that the property of an innocent third party must be forfeited? In my view the Ordinance does not call for any such forfeiture. Were the case otherwise one must reach the most absurd positions. It is to be said that if a litigant is dissatisfied with a decision of mine he could out of spite, leave this Court and go downstairs to where my car is garaged and place some dutiable liquor in it or himself get into my car with dutiable liquor in his possession have himself arrested by the Monopolies Department and have my car forfeited under this section? Surely that would be absurd? The Ordinance cannot in my opinion have such a meaning as applied to an innocent third person.

But, as I see it, the Legislature, in terms in which I am unable to find any lack of clarity or ambiguity, has chosen to give a discretion to the revenue officer. Obviously by an improper exercise of that discretion the most preposterous positions might arise. But the Legislature has relied upon the revenue officer exercising his discretion properly and thus avoiding any such absurdity as in the example given by the learned Judge. I hold that under section 83 (1) of the Liquors Revenue Ordinance the Magistrate had no discretion and was bound to order the forfeiture of the car which the Revenue Officer had seized.

In arriving at this decision I am following an earlier decision of this Court, *Rex v. Ong Guan*[8], which does not appear from the report of *Tan Ah Lek's* case to have been brought to the notice of Pedlow J. *Rex v. Ong Guan* was an appeal from a conviction under the Tobacco Duties Ordinance, of which section 55 (1) is in almost identical terms as section 83 (1) of the Liquors Revenue Ordinance. It reads :—

> All tobacco in respect of which any offence under this Ordinance has been or is being committed, together with any receptacle, package, cart, carriage or conveyance in which the same is found, may be seized by any revenue officer, and any tobacco, receptacle, package, cart, carriage or conveyance so seized shall be forfeited.

I would respectfully adopt the last five lines of the judgment of Terrell J. in the *Ong Guan* case :—

> It should be observed that it is entirely outside the province of judges or magistrates to mitigate the harshness of a law by arrogating to themselves a discretion of which the legislature has thought fit to deprive them.

Upon the question of harshness it is only fair to observe that section 202 of the Customs Consolidation Act 1876 contains a similar provision. It says :—

> All....conveyances....made use of in the importation, landing, removal, or conveyance of any uncustomed, prohibited, restricted, or other goods liable to forfeiture under the Customs Act shall be forfeited.

In *De Keyser v. British Railway Traffic and Electric Co. Ltd.*[9] a lorry had been taken by an employee of the owners of the lorry and used for the commission of the offence. The lorry having been seized and an order for forfeiture having been made, it was argued on behalf of the owners before the Court of Criminal Appeal that they did not know of the wrongful use for which the lorry was being employed. It was held that that fact was wholly irrelevant. Lord Hewart L.C.J. said :—

> If that sort of argument were to be open to the owner of a conveyance in such a case as the present, the result might be, in the case of two partners, where one was aware of the wrongful use to which the vehicle was being put and the other was not, that the vehicle might be excused from condemnation because of the innocent mind of one of the partners, that result enuring for the benefit of the guilty partner.

The order will be :—

(1) The appellant's conviction and sentence are set aside;

(2) The order of forfeiture is confirmed.

Order Accordingly.